No. 03-897

IN THE

Supreme Court of the United States

NORTH CAROLINA PAYPHONE ASSOCIATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM IN OPPOSITION OF LOCAL EXCHANGE CARRIER RESPONDENTS

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents SBC Communications Inc. and the Verizon telephone companies state the following:

SBC Communications Inc. is a publicly held corporation with equity and debt in the hands of the general public. SBC Communications Inc. has no parent company, and no publicly held company has a 10% or greater ownership interest in SBC Communications Inc.

The **Verizon telephone companies** are wholly owned subsidiaries of Verizon Communications Inc., a publicly held company. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

Verizon Communications Inc. has no parent company, and no publicly held company has a 10% or greater ownership interest in Verizon Communications Inc.

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MEMORANDUM IN OPPOSITION OF LOCAL EXCHANGE CARRIER RESPONDENTS

SBC Communications Inc. and the Verizon telephone companies that are not Bell Operating Companies ("BOCs")* respectfully oppose the petition for a writ of certiorari filed by the North Carolina Payphone Association ("NCPA"). NCPA argues that the decision on review conflicts with this Court's jurisdictional analysis in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). Contrary to NCPA's claim, however, the D.C. Circuit cited *Iowa Utilities Board*, quoted from it extensively, and properly applied the principles that this Court established in that decision. The D.C. Circuit thus made no error. Even if that were not the case, NCPA complains of a mere "misapplication of a properly stated rule of law" of the type that this Court "rarely" reviews. Sup. Ct. R. 10. Review is particularly unwarranted because the regulatory issue that NCPA seeks to present involves no important question of federal law. The Court should deny the petition.

STATEMENT OF THE CASE

1. This case is about the scope of federal authority to regulate intrastate telephone service rates that local telephone companies charge to payphone service providers. Until the mid-1980s, pay telephones' coin-control functions were performed not by the payphone itself but by network equipment located in the telephone company's central office; for that reason, all pay telephone service was provided by telephone companies. *See* Pet. App. 3a. After the development of "smart" payphones, with built-in coin-control devices, independent entities, unaffiliated with the local telephone company, were able to offer payphone service by ordering an ordinary business line from the telephone company and attaching a payphone. *See id.* at 3a-4a.

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* Those non-BOC Verizon telephone companies are: Verizon California Inc., Verizon Florida Inc., Verizon Hawaii Inc., Verizon North Inc., Verizon Northwest Inc., Verizon South Inc., and Verizon West Coast Inc.

Initially, local telephone companies and independent payphone service providers did not compete on an equal footing, because local telephone companies were subject to numerous regulatory strictures. Section 276 of the Telecommunications Act of 1996, which amended the Communications Act of 1934 (as amended, the "Act"), was passed to deregulate the payphone market, to eliminate the subsidies (such as fees imposed on long-distance telephone companies known as "access charges") that had supported local telephone companies' payphones, and to give local telephone companies freedom to compete in all aspects of the payphone market. *See generally* 47 U.S.C. § 276.

2. The Federal Communications Commission ("FCC" or "Commission") and its Common Carrier Bureau adopted a series of orders in 1996 and 1997 to implement the requirements of section 276. Among the issues that the FCC addressed in those orders were the rules governing provision of telephone service by local telephone companies to payphone providers – including especially independent payphone providers. After years of controversy concerning the meaning and scope of those initial orders, the FCC issued the order that gave rise to the decision below. *See* Pet. App. 20a-60a.

In the proceeding leading up to the order, local telephone companies had challenged the FCC's jurisdiction to adopt regulations governing the rates that local telephone companies charge for basic intrastate services. Telephone companies argued that, with respect to such rates, nothing in section 276 overrides the limitation on the FCC's intrastate jurisdiction contained in section 2(b) of the Act. *See* 47 U.S.C. § 152(b) ("nothing in this [Act] shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service"). The FCC disagreed, holding that section 276(a) – which provides that no "Bell operating company that provides payphone service" shall subsidize or discriminate in favor of its affiliated payphone service – "necessarily appl[ies] to both intra- and interstate payphone service." Pet. App. 39a. The FCC also held that section 276(b)(1)(C) – which authorizes the FCC to adopt "nonstruc-

tural safeguards for Bell operating company payphone service" – grants the Commission the authority to set intrastate rates.

But the FCC found it has no such authority with respect to intrastate rates charged by telephone companies that are not BOCs. Under the Act, "Bell operating company" is a defined term, and includes the few dozen local telephone operating companies that were once a part of pre-divestiture AT&T. *See* 47 U.S.C. § 153(4). By contrast, the generic statutory term for local telephone companies under the Act is "local exchange carrier." *Id.* § 153(26). Because the only statutory provisions supporting the FCC's assertion of intrastate jurisdiction refer to "Bell operating compan[ies]" and not "local exchange carriers" generally, the FCC "[did] not find that Congress has expressed with the requisite clarity its intention that the Commission exercise jurisdiction over the intrastate payphone prices of non-BOC LECs." Pet. App. 45a-46a.

3. All of the Bell operating companies petitioned for review of the FCC's assertion of jurisdiction over BOCs' intrastate payphone line rates; independent payphone providers petitioned for review from the FCC's refusal to assert jurisdiction over rates charged by non-BOC LECs.

The court denied both petitions for review. Pet. App. 1a-19a. With regard to the BOCs' petition, the court held that "section 276 unambiguously and straightforwardly authorizes the Commission to regulate the BOCs' intrastate payphone line rates." *Id.* at 12a. The court likewise denied the payphone providers' petition, noting that "sections 276(a) and 276(b)(1)(C), the sources of the Commission's authority to regulate intrastate payphone rates, expressly apply only to the BOCs. We must presume that when Congress referred to 'Bell operating companies' rather than 'local exchange carriers,' it acted deliberately." *Id.* at 16a. The court also noted that none of the general, non-payphone specific provisions of the Act that pre-date the 1996 amendments could "trump section 152(b)'s specific command." *Id.* at 17a (citing *Iowa Utils. Bd.*, 525 U.S. at 381 n.8 ("Insofar as Congress has remained silent . . . § 152(b) continues to function.")).

REASONS FOR DENYING THE WRIT

I. THE PETITION MERELY CLAIMS THAT THE COURT OF APPEALS MISAPPLIED A PROPERLY STATED RULE OF LAW

NCPA does not identify any split in the circuits, it does not invoke this Court's supervisory powers, and it cannot seriously maintain that the issue presented – which involves an obscure regulatory ruling with limited impact on a narrow and dwindling class of customers – is an important question of federal law. Instead, NCPA's principal argument is that the decision below "is in conflict with" *Iowa Utilities Board*, Pet. 11, but the court below articulated legal standards that follow this Court's precedent to the letter. Far from entering into conflict with this Court's decision, the court below drew on *Iowa Utilities Board* and other Supreme Court precedent repeatedly and quoted from this Court's decisions extensively, both in denying the BOCs' petition for review and in making the determination at issue here.

In denying the BOCs' petition, the court compared section 276(a) to the Act's "local competition provisions," 47 U.S.C. §§ 251, 252, and applied this Court's holding that "limiting Commission jurisdiction to interstate matters 'would utterly nullify the 1996 amendments.'" Pet. App. 14a (quoting *Iowa Utils. Bd.*, 525 U.S. at 380). Thus, the court below gave full attention to this Court's holding that, "'[a]fter the 1996 Act, § 152(b) may have less practical effect.'" *Id.* (quoting *Iowa Utils. Bd.*, 525 U.S. at 381 n.8).

At the same time, the court of appeals also heeded this Court's admonition that, although the FCC has authority "to make rules governing matters to which the 1996 Act applies," it may not "regulate any aspect of intrastate communication *not* governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction." *Iowa Utils. Bd.*, 525 U.S. at 380, 381 n.8; *see also* Pet. App. 17a. And it applied this rule in determining that, "[a]bsent authorization to apply its section 276 regulations to non-BOC LECs, the Commission may not regulate their intrastate payphone line rates." *Id.*